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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBEAL MESFIN, Defendant and Appellant.	B289916 (Los Angeles County Super. Ct. No. BA452763)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Robeal Mesfin appeals the judgment entered following a jury trial in which he was convicted of assault with the intent to commit rape during a first degree burglary. (Pen. Code, § 220, subd. (b).) The trial court sentenced appellant to a term of life in prison with the possibility of parole. Appellant seeks to overturn his conviction on the ground that the trial court abused its discretion in admitting evidence of his commission of a prior uncharged sex offense. We disagree and affirm.

FACTUAL BACKGROUND

On August 14, 2016, Jaime H. was staying in a motel on Sunset Boulevard with her boyfriend. The boyfriend left the room about 6:00 p.m. following an altercation. Between midnight and 1:00 a.m., Jaime walked outside to load some personal items into her vehicle. She heard a commotion on the street, and thinking her boyfriend might be involved in a fight, she went to the sidewalk to see what was happening.

Jaime was smoking a cigarette and watching the dispute unfolding across the street when appellant rode up on a bicycle and asked her for a cigarette. Jaime handed appellant the cigarette she was smoking. Appellant told Jaime he had to ride all the way to West Hollywood and asked her for some water. Jaime said she would bring him a cup of water, but said, " 'Don't follow me. I don't trust anybody in L.A.' " Jaime walked back to her motel room and returned with a cup of water, which she gave to appellant.

Jaime returned to her truck and passed appellant on her way back to her room. Appellant asked for another glass of water. The second request "annoyed" Jaime, but she reluctantly agreed to bring appellant more water. Jaime again told appellant to stay there while she went to the room to get him more water. Jaime had a "weird feeling" and grabbed her phone to pretend she

was on a call in hopes appellant would not ask for more water. She had her keys in her other hand.

When Jaime opened the door to leave the room, appellant "was right there." He pushed the door farther open and then pushed Jaime to the ground. Jaime landed on her back. Appellant leaned over her and held her down. As Jaime screamed and struggled, appellant said, " 'Shut the fuck up or I'm going to kill you.' " Appellant told Jaime he was going to rape her and ripped off her underwear. Appellant punched and choked Jaime as she continued to struggle. He grabbed a blanket from the bed, wrapped it around Jaime's head, and punched her in the face. Jaime screamed "rape" repeatedly and struck appellant with her keys and her fists. Appellant suddenly stopped hitting her, got up, and left.

DISCUSSION

I. The Trial Court Properly Admitted Evidence of Appellant's Prior Uncharged Sex Offense Under Evidence Code Sections 1108 and 352

Appellant contends the trial court abused its discretion by admitting evidence of a prior uncharged sex offense against Danya C. pursuant to sections 1108 and 352.[1] We disagree.

A. Appellant's prior uncharged sex offense

Susan Kruglov lived in a large apartment complex in Pasadena. On October 23, 2008, around 7:00 a.m., Kruglov left her apartment and went to the elevator in her building. When the elevator doors opened, Kruglov saw appellant holding

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[1] Undesignated statutory references are to the Evidence Code.

Danya C. from behind pushing her against the wall at the back of the elevator. Danya was completely naked from the waist down and some of her hair appeared to have been ripped out. Appellant's pants were pulled down. He appeared to be sexually assaulting the woman, and she looked "very frightened" and "terrified."

Kruglov asked Danya if she was okay, and Danya indicated she was not. Kruglov grabbed Danya's hand and pulled her out of the elevator. The two women hurried to Kruglov's apartment, where Kruglov locked the door and they called the police.

Pasadena police officer Charles Reep spoke to Danya and Kruglov about the incident that morning. Danya told Officer Reep that she worked as an exotic dancer and had been hired to strip for appellant and his friend for payment of $300. After Danya had stripped for them in the friend's apartment, appellant's friend paid her $200. Appellant told her he needed to visit an ATM for the rest of the money, and he escorted Danya from the apartment into the elevator.

Danya was examined by a sexual assault nurse examiner. The examiner observed a large clump of hair was missing from Danya's head, and hair was still falling out. Danya's shirt was damaged, a piece of gold jewelry on the shirt had become detached, and a necklace Danya was wearing was broken. The examiner did not find any injuries to Danya's genitalia.

Around 3:00 p.m. that afternoon appellant showed up at the Pasadena police station and asked to speak with Officer Reep about the investigation. Appellant told the officer he was at his friend's apartment when they decided to order exotic dancers for entertainment. By the time Danya arrived, appellant's friend had fallen asleep. Appellant paid Danya $300 of the $600 she was owed, and they left the apartment to go to an ATM so

appellant could pay her the rest. When they entered the elevator Danya offered to give oral sex for $100. Danya knelt down in front of appellant and began to orally copulate him. When the elevator doors opened Kruglov was standing there. Danya immediately stood up and walked out of the elevator leaving all of her belongings behind. Appellant insisted he did not push Danya against the elevator wall, he did not force her to have sex with him, and he did not try to penetrate her from behind.

B. Procedural background

The trial court ruled that the evidence of the 2008 incident involving Danya was admissible under section 1108, subdivision (a). In so ruling, the court restricted the evidence to Kruglov's observations, Officer Reep's investigation and conversation with appellant, and the nurse examiner's findings. The court specifically found the probative value of the evidence outweighed any prejudicial effect under section 352 and noted that evidence of the uncharged conduct was relevant to determining appellant's intent with respect to the charged crime.

C. Applicable law

"Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).)" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095 (*McCurdy*).) However, section 1101, subdivision (b) provides an exception for admission of such evidence for the limited purpose of establishing identity, common plan, or intent " 'if the charged and uncharged crimes are sufficiently similar to support a rational inference' on these issues." (*People v. Edwards* (2013) 57 Cal.4th 658, 711.)

Section 1108 operates as a broader exception to the general rule prohibiting use of character evidence by allowing the

admission of evidence of a defendant's uncharged sexual offenses to prove a propensity to commit a charged sexual offense, subject to the trial court's discretion to exclude the evidence under section 352. (*McCurdy*, *supra*, 59 Cal.4th at p. 1095.) As our Supreme Court has observed, "the clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses. 'The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony.' [Citations.] '[C]ase law clearly shows that evidence that [a defendant] committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses.' " (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164; *People v. Avila* (2014) 59 Cal.4th 496, 515 (*Avila*) [" 'Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes' "].)

"Unlike evidence admitted under Evidence Code section 1101, subdivision (b), evidence of uncharged sex crimes admitted under . . . section 1108 may be used in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes" (*McCurdy*, *supra*, 59 Cal.4th at p. 1095), and there is no requirement under section 1108 that the sex offenses be similar (*People v. Jones* (2012) 54 Cal.4th 1, 50). "Such a requirement was not added to the statute because 'doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is

rationally probative. Many sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character.' " (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Accordingly, it is enough for admission under section 1108 that the charged and uncharged offenses are sex offenses as defined in the statute. (*People v. Cordova* (2015) 62 Cal.4th 104, 133 (*Cordova*); *People v. Loy* (2011) 52 Cal.4th 46, 63.)

Under section 1108, evidence of an uncharged sex offense "is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters." (*Cordova*, *supra*, 62 Cal.4th at p. 132.) " 'Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion.' " (*Avila*, *supra*, 59 Cal.4th at p. 515; *Cordova*, *supra*, at p. 132.)

D. The trial court did not abuse its discretion in admitting evidence of the prior uncharged offense

"To determine whether section 1108 evidence is admissible, trial courts must engage in a 'careful weighing process' under section 352. [Citation.] 'Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses,

or excluding irrelevant though inflammatory details surrounding the offense.' " (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 823–824 (*Daveggio*).)

Here, evidence of appellant's uncharged sex offense against Danya in 2008 was admissible under section 1108 because it was probative of appellant's propensity to commit sex offenses as well as his intent when he committed the acts underlying the charged crime, and it strengthened the credibility of the victim in this case. Appellant, however, contends the trial court should have excluded the evidence under section 352 because its admission was unduly prejudicial. We begin our assessment of appellant's claim by observing that " '[p]rejudice,' as used in . . . section 352, is not synonymous with 'damaging.' [Citation.] Rather, it refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the legal issues raised in the trial." (*McCurdy*, *supra*, 59 Cal.4th at p. 1095.)

1. The charged and uncharged offenses bore numerous similarities.

Although the prior conduct need not be similar to the charged offense for admission under section 1108, similarity of the offenses is a consideration in the court's section 352 analysis. Here, the prior sexual offense bore sufficient similarities to the charged crime to support the trial court's exercise of discretion in admitting the evidence.

In both offenses, appellant used physical force and displayed a clear intent to rape his victim. Both victims were female strangers, and appellant attacked them both in confined spaces where there would be no witnesses. He also used a ruse in order to isolate both victims: Telling Danya he would take her with him to an ATM to get the additional money he owed her,

appellant proceeded to isolate her inside an elevator; and in Jaime's case, appellant asked for a cup of water and followed her to her motel room where he was able to force his way in and trap her inside as she was coming out.

2. The evidence of the offense against Danya was probative of Jaime's credibility.

Part of the defense strategy in this case was to attack Jaime's credibility, the victim and only witness to appellant's conduct. By helping to support Jaime's credibility, the admission of evidence of the offense against Danya served the very purpose of section 1108. As explained by our Supreme Court: " '[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes.' " (*People v. Jones*, *supra*, 54 Cal.4th at p. 49.) By showing appellant's disposition to commit sex crimes through independent sources, evidence of the 2008 sexual assault bolstered Jaime's credibility and suggested she was telling the truth.

3. The evidence regarding the uncharged offense was not more inflammatory than the facts of the charged offense.

The trial court expressly excluded from evidence the more salacious facts and inflammatory details of the prior offense, rendering the possibility of an improper prejudicial effect from this evidence quite low. (See *Daveggio*, *supra*, 4 Cal.5th at p. 824 [trial courts must consider availability of less prejudicial

alternatives to outright admission of prior offense, such as " 'excluding irrelevant though inflammatory details surrounding the offense' "].)

As the trial court recognized, the evidence before the jury of the uncharged offense was no more inflammatory than the evidence of the charged offense. With respect to the prior offense, the jury learned that Danya suffered no injuries other than having some of her hair pulled out. In contrast, the jury heard testimony and was presented with images showing Jaime's blood-stained clothing along with her bruised neck, red and swollen face, and other facial injuries Jaime suffered in the attack.

In this regard, appellant's reliance on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*) is misplaced. In *Harris*, the defendant was charged with sex offenses in which he was alleged to have "licked and fondled" two women who were mental health patients at a treatment center where defendant worked as a nurse. (*Id*. at pp. 730–732, 738.) By contrast, the uncharged offense admitted under section 1108 consisted of what the appellate court described as a "23-year-old act of inexplicable sexual violence," which the court labeled as "inflammatory *in the extreme*" and "heavy with 'undue prejudice.' " (*Harris*, at pp. 738, 740.) Declaring the evidence to be "remote, inflammatory and nearly irrelevant," *Harris* held its admission resulted in a miscarriage of justice requiring reversal. (*Id*. at p. 741.)

Harris plainly does not support appellant's contention that the trial court abused its discretion in this case by admitting evidence of the prior incident. As we have noted and the trial court found, appellant's sexual assault on Danya was probative on the issues of appellant's intent and the victim's credibility in this case, and the two offenses shared several key similarities. And unlike *Harris*, the evidence admitted regarding the prior

offense here was less inflammatory than the charged attempted rape of Jaime. Moreover, there is no indication the evidence of appellant's prior conduct confused the jury, nor was it unduly remote. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 284–285 [no indication evidence of prior offense confused the jury, and 30-year gap between offenses did not make the prior offense too remote]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [prior conduct 12 years before charged conduct not too remote]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [prior offenses 20 years before trial not too remote].)

4. The fact that appellant was neither convicted nor charged for the prior offense has no bearing on whether the evidence was admissible under section 1108.

Finally, appellant argues that the evidence of the 2008 sexual assault should have been excluded because he was never convicted or even charged with the offense. But the presence or absence of any charge in connection with the assault is irrelevant to the question of whether the evidence underlying that offense was admissible under section 1108. The language of the statute contains no mention of a prior *charge* or *conviction*, but refers instead only to *evidence* of defendant's commission of another sexual offense. Of course, "evidence" includes testimony, and thus testimony describing a prior uncharged sexual offense plainly qualifies for admission under section 1108. (See *People v. Lopez* (2007) 156 Cal.App.4th 1291, 1298–1299; *People v. Britt* (2002) 104 Cal.App.4th 500, 506.)

Further, the prosecution was not required to meet the standard necessary to charge or obtain a conviction for admission of evidence of the prior offense. (*People v. Lopez*, *supra*, 156 Cal.App.4th at p. 1299; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419, fn. 6.) Rather, what was required was only that the

prior offense be established by a preponderance of the evidence. (*Lopez*, at p. 1299.) Here, that standard was surpassed by the direct testimony of Kruglov, Officer Reep, and the nurse examiner, which provided abundant evidence that the offense occurred.

II. Custody Credits

The trial court awarded appellant 373 days of custody credit, consisting of 325 actual days for time served plus 48 days of conduct credit as a strike offender. However, there is some indication that appellant was in presentence custody for a period of 327 days—from the date of his arrest on June 2, 2017 through the date of sentencing on April 24, 2018. Further, the abstract of judgment indicates appellant received no custody credits, and the minute order contains no reference to custody credits. Because the record is unclear, the matter must be remanded to the trial court to correctly calculate the number of days of custody credit to which appellant is entitled. (See *People v. Fares* (1993) 16 Cal.App.4th 954, 959–960.)

DISPOSITION

The matter is remanded to the trial court with directions to issue an order properly determining appellant's presentence custody credits, prepare a new abstract of judgment, and forward the same to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.